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In the Supreme Court of the United States

OCTOBER TERM, 1982

CLARENCE MOORE, PETITIONER

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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QUESTION PRESENTED

Whether the district court properly granted summary judgment in an action for collection of civil penalties for violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1201 *et seq.*, against a mine operator who had been served with a notice of proposed assessment of the penalties, but failed to utilize the available administrative remedies for challenging the assessed penalties.

TABLE OF CONTENTS

| | Page |
|----------------------|------|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 4 |
| Conclusion | 7 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|---|
| <i>Armstrong v. Manzo</i> , 380 U.S. 545 | 6 |
| <i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 | 6 |
| <i>Schroeder v. City of New York</i> , 371 U.S. 208 | 6 |

Constitution, statutes and regulations:

| | |
|--|---------|
| United States Const. Amend. V (Due Process Cl.) | 5 |
| Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1201 <i>et seq.</i> : | |
| Section 502(a), 30 U.S.C. (Supp. V) 1252(a) | 2 |
| Section 518, 30 U.S.C. (Supp. V) 1268 | 2, 4, 7 |
| Section 518(a), 30 U.S.C. (Supp. V) 1268(a) | 4 |
| Section 518(b), 30 U.S.C. (Supp. V) 1268(b) | 5 |
| Section 518(c), 30 U.S.C. (Supp. V) 1268(c) | 5, 7 |

IV

Page

Constitution, statutes and regulations—Continued:

30 C.F.R. Part 723:

| | |
|-------------------------|---|
| Section 723.16(b) | 2 |
| Section 723.18 | 5 |
| Section 723.19 | 5 |

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 30-32) is not reported. The judgment order of the district court (Pet. App. 27-29) also is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1982. The petition for a writ of certiorari was filed on January 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 11, 1979, inspectors of the Department of the Interior's Office of Surface Mining ("OSM") discovered an open pit and mining equipment on a site in Campbell County, Tennessee. Believing that the mining operation was being conducted by Julian H. ("Dude") Crews, OSM

officials issued a cessation order to Crews for opening or developing a new surface coal mining operation without obtaining a state permit, in violation of Section 502(a) of the Surface Control and Reclamation Act of 1977 ("Surface Mining Act"), 30 U.S.C. (Supp. V) 1252(a). A notice of four other violations of the Act and the implementing regulations also was issued on that date, and the operator was directed to take remedial action to bring the site into compliance with federal law. J.A. 7-8.¹ A few days later, on May 14, 1979, OSM officials learned that petitioner also was involved in the mining operation. Accordingly, the cessation order and notice of violation were modified on that date to include petitioner. J.A. 41.²

On June 6, 1979, pursuant to Section 518 of the Surface Mining Act, 30 U.S.C. (Supp. V) 1268, and 30 C.F.R. 723.16(b), OSM sent a notice of a proposed assessment of civil penalties, together with an accompanying copy of a worksheet showing the computation of the proposed assessed penalties in the amount of \$13,100, to petitioner and Crews. J.A. 9-14. The notice of proposed assessment, which referred to the previously issued notice of violation, stated, among other things, that "THE PROPOSED PENALTY WILL BECOME FINAL AND PAYABLE WITHIN 30 DAYS from the date you received this letter UNLESS YOU REQUEST A CONFERENCE OR HEARING * * *." J.A. 9. This statement was followed by detailed instructions advising petitioner and Crews how their rights to an informal conference or a formal hearing or both could be pursued, including a warning that, if they did not make conditional payment of the assessed penalty into an escrow

¹"J.A." references are to the joint appendix filed in the court of appeals.

²The record in the courts below does not disclose whether the modified cessation order and notice of violation were served upon petitioner.

account, they could forfeit their right to a hearing. J.A. 9-10; see also page 5, *infra*. Although petitioner admitted receipt of the notice of proposed assessment (J.A. 21), he did not request any conference or hearing nor did he pay the assessed penalty.

2. Notwithstanding additional notices and orders by OSM, neither petitioner nor Crews made any effective attempt to remedy the violations. Accordingly, on March 12, 1980, the United States brought a civil action in the United States District Court for the Eastern District of Tennessee, seeking an order restraining them from further operation of the mine in violation of federal law and compelling them to restore the site. The district court, noting that the defendants had "conceded their responsibility for the mine site in question," entered a permanent injunction granting the government the requested relief. *United States v. Julian H. Crews and Clarence Moore*, Civil Action No. 3-80-100 (Apr. 18, 1980) (the order granting a permanent injunction is reproduced as an addendum to the United States' brief in the court of appeals).

3. The United States filed the instant action on February 3, 1981, this time seeking to collect the unpaid penalties that had been assessed against petitioner and Crews. J.A. 4-6.³ Petitioner failed to file a timely answer to the complaint; instead, by letter to the United States Attorney dated March 12, 1981, he generally disclaimed responsibility for the violations and asserted that the assessed penalties were excessive. J.A. 21. He further stated (*ibid.*; emphasis in original), however, that "[t]he violations and *proposed* assessments were mailed to me and received by Pam Mason

³The complaint as originally filed named only DC Coal Co., Inc., as a defendant. On February 25, 1981, the government amended its complaint to substitute as defendants petitioner and Crews, individually and d/b/a DC Coal Company. J.A. 19.

at my field office in Newcomb as shown in documents attached to the complaint." The government filed the letter in the district court proceedings with a request that it be treated as petitioner's answer and moved for judgment on the pleadings. J.A. 22-23.

After the court had scheduled a hearing on the government's motion, petitioner filed a formal answer in which he disclaimed all responsibility for the violations at the site. J.A. 24-27. Petitioner also denied receiving a copy of the notice of violation and claimed that he had been deprived of his rights to a hearing. J.A. 24-25. Petitioner, however, admitted that he had never paid the assessed civil penalty. J.A. 25. Moreover, during the hearing before the district court, petitioner, through his counsel, admitted that he had been served with the notice of proposed assessment of the civil penalty. J.A. 47-49.⁴

The district court, treating the government's motion for judgment on the pleadings as a motion for summary judgment, entered judgment in favor of the United States (Pet. App. 27-28). The court of appeals affirmed (*id.* at 30-32).

ARGUMENT

Section 518 of the Surface Mining Act, 30 U.S.C. (Supp. V) 1268, prescribes the manner for assessing civil penalties for violations of the Act. Section 518(a), 30 U.S.C. (Supp. V) 1268(a), provides that the Secretary may assess civil penalties for violations of the Act (and shall assess such penalties where a cessation order has been issued), not to exceed \$5,000 for each violation. Such penalties may be assessed "only after the person charged with a violation

⁴Petitioner supported the allegations contained in his answer with his own affidavit, which stated (J.A. 34), *inter alia*, that he had never received the notice of violation or the final order from OSM stating that the proposed assessment of the penalties had become final.

* * * has been given an opportunity for a public hearing," which "shall be of record and shall be subject to section 554 of title 5." Section 518(b), 30 U.S.C. (Supp. V) 1268(b). The critical provision for purposes of this case is Section 518(c), 30 U.S.C. (Supp. V) 1268(c), which provides that, within 30 days of the issuance of a notice or order charging a violation, the Secretary shall inform the operator of the proposed amount of the penalty, and that "[t]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account." Should the operator prevail in whole or in part in the administrative proceedings or on judicial review, the deposited funds or the appropriate part of them must be returned with interest. *Ibid.* "Failure to forward the money to the Secretary within thirty days," however, "shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." *Ibid.*⁵

Petitioner, relying on his alleged failure to receive either a copy of the notice of violation or the final order confirming the proposed assessment of the penalties, contends (Pet. 11-21) that he was denied his rights under the Due Process Clause of the Fifth Amendment and the Surface Mining Act, and, consequently, that the district court erred in entering summary judgment against him. This claim is baseless. Furthermore, the decision of the court of appeals affirming

⁵The Secretary's regulations implementing Section 518(c) substantially track the language of the statute and provide that a person charged with a violation may contest the proposed penalty or fact of violation at a formal evidentiary hearing by submitting a petition requesting a hearing and an amount equal to the amount of the proposed penalty. 30 C.F.R. 723.19. In addition, upon request, an operator will be entitled to an informal conference concerning the proposed assessment without making any deposit. 30 C.F.R. 723.18.

the district court's entry of summary judgment in favor of the United States does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. While petitioner insists that he was never served with copies of the notice of violation or final order, he studiously avoids mentioning the notice of the proposed assessment, which he admitted receiving and which, as described above (pages 2-3, *supra*), expressly informed him that the proposed assessed penalty would become final in 30 days unless he requested review and that his failure to pay the assessed amount could result in the forfeiture of his right to a hearing. Despite this unequivocal notice, petitioner neither paid the proposed assessed penalty nor attempted to pursue his rights to a hearing. To the contrary, petitioner simply ignored the notice of the proposed assessment until the United States instituted this collection action. Hence, petitioner's assertion that there remains a material issue of fact in the district court concerning whether he received adequate notice of the proposed assessed penalty is without foundation. Petitioner admittedly received the notice of the proposed assessment, which expressly advised him of his opportunity to be heard "at a meaningful time in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and that the proposed assessment would become final if he neglected to take advantage of that opportunity.

Petitioner thus was given notice reasonably calculated to apprise him of the pending action against him and he was afforded an opportunity to present his objections. In these circumstances, due process requires no more. See *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

2. Nor does OSM's alleged failure to serve petitioner with copies of the notice of violation or final order amount to inadequate notice of the assessment of civil penalties under the statute. Section 518 of the Act, 30 U.S.C. (Supp. V) 1268, does not make service of a notice of a violation a prerequisite to assessing a civil penalty. Rather, what was done here is precisely what the statute requires (30 U.S.C. (Supp. V) 1268(c)): "the Secretary * * * inform[ed] the operator within thirty days [of the notice of violation] of the proposed amount of [the] penalty." That notice, which petitioner admittedly received, advised him of the procedures available to challenge the fact of violation or the amount of penalty and that, if he failed to take advantage of those procedures, the proposed assessment would become final.

The final order merely confirmed that the proposed assessment had indeed become final by operation of law when petitioner failed to request review. Hence, petitioner lost nothing by the alleged failure to serve the final order upon him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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